# National Association of Regulatory Utility Commissioners
**Incorporated**






May 28, 1997

The Honorable John D. Dingell
Ranking Minority Member
Committee on Commerce
2322 Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Dingell:

Thank you for your letter of inquiry regarding competition in the electric industry.

As the attached responses indicate, many States have already approved or are currently implementing retail electric restructuring programs, while most others are contemplating such initiatives. It is also the case that States have sufficient authority to address many of the complex issues that arise in their respective electric restructuring efforts. At the same time, NARUC acknowledges that State processes would be enhanced, and burdensome litigation avoided, through certain statutory clarifications if restructuring legislation were to advance in Congress.

Again, thank you for the opportunity to address competition in the electric industry. I am hopeful the attached responses are useful to you. If you need additional information please to not hesitate to contact me.

Sincerely,

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**1. To date, how many states have adopted retail competition? How many are engaged in pilot programs? How many have considered and rejected the idea?**

At least 9 States have adopted retail competition policies through State legislation and/or final commission order, and are in various stages of implementation.[1] In addition, there are 6 States that are in the process of implementing pilot, trial or other experimental programs.[2] We know of no States that have rejected the idea of competition as a permanent decision. Even a State such as Maryland, whose commission determined that retail competition was not an appropriate policy at the time its decision was made, continues to review the issue in light of developments at the Federal level and in other States.

**2. To your knowledge, has any state asked Congress to enact legislation to mandate retail competition? Have any states sought Congressional action to enable or assist them in adopting retail competition?**

As to the first part of this question: On March 20, 1997, John M. Quain, Chairman of the Pennsylvania Public Utility Commission, which is in the process of implementing State legislation establishing retail competition, testified before the Senate Committee on Energy and Natural Resources in favor of federal legislation which would require State regulatory commissions to implement a program of retail competition by a date certain. We know of no other instances where a representative of a State commission has made a similar request, although other representatives of State government, including certain governors and legislators, have made public statements favoring a federal mandate for retail competition.

As to the second part: Acting through NARUC, the State regulatory commissions have adopted a policy resolution (attached hereto as Appendix B) which takes the position that if Congress were to consider restructuring legislation, it can assist States in pursuing retail competition by affirming or clarifying State authority over electric utilities in the following ways: (1) affirm exclusive State jurisdiction over the regulation of the rates, terms and condition of retail electric services, thereby removing any doubt over the States' legal authority to implement retail competition and to determine the recovery of stranded costs; (2) clearly establish the authority of States to establish and support (through non-bypassable charges) public benefit programs and to ensure that all market participants adhere to health, safety, reliability and consumer protection requirements; and (3) eliminate the threat of customer bypass of the local distribution network. NARUC also believes that as part of any

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[1] We have attached hereto the "Electric Industry Restructuring Box Score" prepared by the National Regulatory Research Institute, dated April 30, 1997, as Appendix A. The 9 States with retail competition policies in place include Arizona, California, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island and Vermont.

[2] Some of the States listed in footnote 1 have pilot programs in place as part of their implementation plans. In addition, the following States are undertaking trial programs, but have not yet adopted an across-the-board policy: Idaho, Indiana, Michigan, Ohio, Oregon and Washington State.

legislative process in this area, Congress should consider legislation authorizing the formation of regional regulatory bodies to address regional transmission and system operation issues.

**3. Do all state public utility commissions currently have sufficient authority to resolve stranded cost issues in the event Congress enacts legislation providing for retail competition by a date certain? If not, what timing and other problems might ensue? What could Congress do to address any such problem?**

We know of no State commission that, as a matter of State law, lacks authority to address the recovery of costs now scheduled for recovery in retail rates. Stated somewhat differently, to the extent that competition affects the recovery of costs now included in retail rates, States have jurisdiction to address recovery issues. However, as noted in the previous answer, while States may have unquestioned authority over retail costs that might be stranded, there may be significant legal impediments to State authority in two critical areas: assignment of costs to specific customers and creation of a mechanism to allow recovery.

The first question involves the bypass issue. State commissions must have the clear authority to ensure that all retail customers (including large customers whose power is delivered at transmission-level voltage) may be assigned responsibility to support the recovery of stranded costs where recovery is determined to be in the public interest. Currently, such customers can argue that by purchasing power from alternative suppliers to be delivered without the use of a utility's local distribution facilities, their purchases are not subject to State jurisdiction under section 201 of the Federal Power Act, and accordingly, they cannot be assigned a share of the utility's stranded costs by the State commission. To eliminate the possibility that customers can bypass the local power delivery network, NARUC recommends that any federal legislation include an explicit anti-bypass provision.

The second question involves the ability of State commissions to impose a non-bypassable fee on facilities used to deliver power. It has been suggested that such fees could constitute a burden on interstate commerce, and thereby violate the "dormant" Commerce Clause. To protect States from time-consuming and expensive litigation, Congress could authorize State commissions to impose charges on the retail delivery of electricity to support stranded cost recovery, along with public benefit programs such as energy efficiency, low-income support, renewable energy and the like. Further, to remove the ability of parties to shop for a more favorable forum at FERC, Congress should confirm that States have exclusive authority to address the recovery of retail costs whether they are stranded as a result of conversion of the retail customer to wholesale (e.g., through municipalization) or through retail wheeling.

**4. Are there any other areas in which states currently do not have the necessary authority to address issues arising from federal legislation mandating competition, or repeal of the Public Utility Holding Company Act of 1935 (PUHCA) or Public Utility Regulatory Policies Act of 1978?**

First, we should make clear the NARUC does not support "federal legislation mandating competition" at the retail level. Rather, Congress should "accord States the discretion to determine when and how to open retail markets to competition." There are ways that Congress can assist States in moving to more competitive markets which we have outlined in our answers to questions 2 and 3 above.

With respect to PUHCA, it is NARUC's view that if Congress reforms or substantially repeals the Holding Company Act, it should be considered in conjunction with "comprehensive legislation to revise the Federal Power Act and restructure the electric utility industry through appropriate state processes."[3] In our view, the issues of PUHCA reform and establishment of restructured retail markets through voluntary state implementation are closely linked and must be considered together. Further, any PUHCA legislation should provide States with the means to obtain access to utility books and records relevant to rates and conditions of service of utility affiliate ratepayers, should preserve the holding company diversification standards recently enacted in the Energy Policy Act and Telecommunications Act, and should not restrict State oversight authority, including the ability to conduct audits and allocate costs, necessary to protect utility consumers that remain captive to the utility. Finally, there must be a transition period of at least two years before any PUHCA legislation takes effect to give State legislatures the time necessary to implement State legislation to fill any regulatory gaps Federal legislation might create.

With respect to PURPA, it is NARUC's position that if the mandatory purchase requirement of section 210 is repealed or modified, it should only occur as part of a legislative approach which builds on State restructuring activities. Specifically, we favor lifting the section 210 purchase requirement in States that have determined "that the acquisition of generating capacity is subject to competition or other acquisition procedures" that the State commission determines to be in the public interest. Given the introduction of competitive generation in the bulk power market, State-regulated utilities should be able to provide evidence to assist the respective commissions in making this determination. Importantly, as part of its reexamination of PURPA's impact, Congress should ensure that any new legislation clearly affirms the authority of the States to determine the prudence of purchases of power at wholesale that utilities resell to their retail customers.

**5. Would any constitutional issues be raised by Federal legislation:**

**a. mandating that states choose between adopting retail competition by a date certain and having a federal agency preemptively impose retail competition? ["case a."]**

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[3] See Appendix C.

**b. requiring states to conduct a proceeding on retail competition, reserving to the states the discretion not to adopt retail competition if they determine doing so would not be in their consumers' best interests? ["case b."]**

In our view, significant constitutional issues are raised in both cases. We would anticipate that if Congress were to adopt either approach, the U.S. Supreme Court would ultimately rule on their consistency with the Constitution, specifically the 10th Amendment which states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." The critical issue raised in these cases is whether the 10th Amendment is violated when Congress enacts legislation requiring States to administer a Federal regulatory program, i.e. whether the Federal government can constitutionally regulate the States as States.

Currently, Tenth Amendment jurisprudence is in significant flux due to recent Supreme Court and lower court rulings. The most significant 10th Amendment case now pending is the Supreme Court's decision to agree to determine whether or not the Brady Handgun Violence Prevention Act, P.L. 103-159 (1993) violates the 10th Amendment by requiring State and local law enforcement officers to conduct background checks, provide written explanations of denials of handgun permits, and to destroy local records of background checks. 18 U.S.C. § 922. Lower courts reviewing the Brady Act have reached conflicting conclusions as to whether these requirements imposed on State and local officials do or do not conflict with the 10th Amendment.[4] On June 17, 1996, the Supreme Court agreed to review challenges to the Brady Act by granting a petition for writ of certiorari to the 9th Circuit Court of Appeals. The case, docketed as *Printz v. U.S.*, No. 95-1478, has been argued and a decision should issue before the Court's term ends in early July 1997. A decision by the Court striking down the Brady Act on 10th Amendment grounds will have a significant impact on the ability of the Congress to require State agencies and officials to implement Federal policies.

Accordingly, until the Court rules, it is difficult to do more than speculate as to how the two cases described in this question would be decided. It is enough to note that both cases would be constitutionally suspect under current case law.

For example, case a. seeks to avoid a 10th Amendment problem by giving the States a choice: they can either agree to use State agencies and procedures to implement a congressional policy (retail competition by a date certain) or exit the field of retail utility regulation by ceding authority to a federal agency. As the 9th Circuit noted in *Mack*, there is support in case law for the proposition that "[t]he federal government may offer to

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[4] Cf. *Koog v. U.S.*, 79 F.3d 452 (5th Cir. 1996) (requirements imposed by Brady Act on local enforcement officers unconstitutional) and *Mack v. U.S.*, 66 F.3d 1025 (9th Cir. 1995), certiorari granted, __ U.S. __, 116 S.Ct. 2521, 135 L.Ed.2d 1046 (1996) (Brady Act requirements constitutional).

preempt regulation in a given area, and permit the states to avoid preemption if they regulate in a manner acceptable to Congress." 66 F.3d at 1029, citing *Hodel v. Virginia Surface Mining and Reclamation Ass'n,* 452 U.S. 264, 290-91, 101 S.Ct. 2351, 2367-68, 69 L.Ed.2d 1 (1981). But in an earlier decision, the 9th Circuit was unwilling to accept the Government's claim that where a State has the choice to abandon the field, the Federal statute must be upheld:

> The government makes two arguments. . . . The first is that [the State of] Washington can avoid the [Forest Resources Conservation and Shortage Relief] Act altogether by simply halting all sales of timber. As the Counties point out, this alternative is a Hobson's choice, because it ignores the State's fiduciary duty to manage the trust in the best interest of the beneficiaries, and ignores the unconditional nature of the commands contained in the Act.
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> *Board of Natural Resources v. Brown*, 992 F.2d 937, 947 (9th Cir. 1993).

Case a. confronts the States with a similar Hobson's choice: adopt retail competition on a Federally-imposed schedule, even if the State finds that its citizens will be harmed as a result, or accede to preemption. It is significant that in its opinion in *Mack* upholding the Brady Act, the 9th Circuit distinguished its holding in *Board of Natural Resources* on the ground that the Federal statute at issue there was more intrusive into State affairs than the Brady Act, and accordingly, presented a more significant 10th Amendment issue: "That Act [the Forest Resources Act] . . . required the States to issue regulations and was far more demanding of state officials than the Brady Act." 66 F.3d at 1032. It could be argued that given the extensive implementation burden shouldered by the State commissions that have adopted retail competition voluntarily (including the promulgation of extensive regulations), case a. is also far more demanding of the State commission resources than the Brady Act, and accordingly, will suffer the fate of the Forest Resources Act.

Case b. is modeled after Title I of the Public Utility Regulatory Policies Act of 1978 (PURPA) where a Federal statute requires States to take certain procedural steps while leaving States free to accept or reject a substantive statutory standard. Specifically, in Title I of PURPA, State commissions were required to conduct administrative proceedings and issue written decisions as to whether their jurisdictional utilities should be required to implement certain Federal standards relating to cost of service ratemaking, elimination of declining block rates, implementation of seasonal rates and the like.[5] In *FERC v. Mississippi*, 456 U.S. 742 (1982), a sharply-divided Supreme Court upheld Title I of PURPA in a 5-4 decision. Relying on the *Hodel* decision, *supra*, the majority reasoned that since Congress could preempt all State utility regulation, it could also take the lesser step of requiring States to consider suggested federal standards. 456 U.S. at 763-766. Speaking for the four member minority (including Justice Powell whose separate dissenting opinion sharply

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[5] *See* PURPA § 111(d).

criticized the procedural requirements imposed upon States by PURPA), Justice O'Connor characterized the procedural requirements imposed on the States by Title I of PURPA as regulation of "the States as States" in violation of the 10th Amendment's allocation of State and Federal power.

In applying *FERC v. Mississippi* to case b., it is important to keep in mind the many changes in Court personnel that have occurred since 1982. Of the five-member majority, only Justice Stevens remains; of the four-member dissent, the Chief Justice and Justice O'Connor remain. Again, the Court's ruling on the Brady Act may offer insight as to whether the PURPA approach of requiring State consideration of Federal policies remains a viable option.

**6. From a practical standpoint, what problems would arise if Congress adopted legislation mandating retail competition which did not grandfather prior state action?**

Congress should not mandate retail competition. However, if there is a Federal mandate, there must be a flexible grandfather provision which permits States to preserve their respective restructuring programs. As a practical matter, failure to grandfather State programs would be very disruptive of State restructuring efforts, because stakeholders that have already begun implementing restructuring under an existing State framework that is not grandfathered would have the opportunity to reopen settled issues, institute new court challenges, or take other actions to derail State efforts that are substantially complete. It would be very counterproductive, for example, for Congress to adopt legislation requiring retail competition by (say) 1999 and not grandfather States with programs scheduled to take effect in 2000. The minimal gain in timing would hardly be worth the disruption to what is likely to be carefully constructed initiatives whose scheduled introduction is a critical component of the overall package.

**7. In hearings before the Energy and Power Subcommittee during the last Congress, some witnesses took the position that Congressional legislation mandating retail competition is necessary to protect the interests of small and residential consumers. This was based on the assertion that large industrial customers are able to negotiate lower rates with state utility commissioners, and that the incidence of such rate reductions is on the increase.**

**a. Are you aware of any study or analysis supporting this conclusion?**

**b Please provide any information you can on the historical relationship between residential and industrial rates, the extent to which one customer class has in effect subsidized another, and whether or not this trend altered in recent years.**

The NARUC does not compile this information and is unaware of any study or analysis that supports or refutes this conclusion.

**8. Although electricity rates vary widely within the U.S., they have fallen recently in some parts of the country. Please provide any information you can about rate trends, and how they affect various customer classes.**

The NARUC does not compile this information. We anticipate that the State commissions will be addressing this issue in their individual responses to the Dingell questionnaire.

**9. Some proponents of retail competition hold the view that all electricity resources should be sold at a market price and that state authority to regulate retail rates should be eliminated. How would such a policy affect shareholders and ratepayers? What mechanisms could states or Congress employ to manage these issues? In a restructured electric industry, who should receive the benefits of these low cost resources -- utility ratepayers, utility shareholders or the highest bidder?**

We believe that whether or not conditions are sufficiently competitive in any given retail electric market to permit pure market pricing is quintessentially an issue to be decided by the States. While one can hope that competition will be sufficiently robust and pervasive so that power sales can be left to market forces, it is unlikely that, at least in the early years, that such conditions will prevail. It can be anticipated that incumbent owners of generation assets may retain some measure of market power -- that is, the ability to set prices for retail power sales in excess of prices a competitive market would establish. Consumers would be harmed by having to pay above-market prices with no cost-based ratemaking to protect their interests. Clearly, during the transition period, there will be a greater need for continuing State supervision of these markets.

With respect to entitlement to low cost resources, again, the issue should be decided at the State level. We believe that Congress should not foreclose a State from deciding that one choice its retail customers should have in a restructured market is the right to continue purchasing power at cost-of-service rate levels from its incumbent utility. Nor should Congress foreclose States from allowing customers to choose to retain bundled service if that is what they want.

Finally, this question raises the issue of whether or not there should be a "provider of last resort" that is obligated to sell electricity to retail customers who lack, for a host of reasons, competitive options in the market. While it is not yet clear whether such providers will be needed in the long run, it is clearly the case that Congress should not preclude the States from implementing programs that require all power suppliers to meet the needs of all customers, including low-income, rural and senior citizens, for affordable electricity.

**10. Of those states which have adopted retail competition, how many have addressed the issue of "reciprocity," that is whether or not the state can bar sellers located in states which have not adopted retail competition from access to its retail markets? Whose interests does a reciprocity requirement affect? Is a reciprocity requirement the only way to protect those interests, or are there alternatives? Would such a requirement raise constitutional issues?**

We do not have information as to the number of States that have raised reciprocity as an issue. In addition, NARUC has not yet adopted a policy on the issue of reciprocity, although we are actively considering the issue.

The reason why reciprocity has become an issue is due to suggestions that any State which restricts sales of power from out-of-state utility companies that are not open to retail competition in their own market areas may violate the "dormant" Commerce Clause. While the Supreme Court's recent decision in *General Motors v. Tracy*, __ U.S. __ (1997) provides support for State efforts that distinguish between service by a regulated utility and service by a competitive marketer for Commerce Clause purposes, a State restricting sales from out of state sources will likely face a substantial litigation risk in the absence of a Federal statute which authorizes States to impose such restrictions.

A reciprocity provision affects the interests of at least four groups: the utility with the retail market open to competition (the open utility), its customers, the out-of-state utility and its customers. For the open utility, the imposition of reciprocity provides a significant benefit: it doesn't have to compete with a power supplier that can use its rate-based generating assets to leverage its entry into the open utility's distribution territory. Reciprocity should reduce the open utility's stranded cost exposure to the extent that it keeps the out-of-state utility's power sales from driving down market prices. For the open utility's retail customers, a reciprocity provision removes a potential supplier from the market, thereby reducing choices. However, a reciprocity provision may also reduce the level of the open utility's stranded costs, thereby reducing its customers' exposure as well.

For the out-of-state utility, reciprocity eliminates a market into which it can sell power and earn revenues. However, this restriction may create an incentive for the utility to open its retail markets to competition in order to have the restriction lifted. For the out-of-state utility's customers, reciprocity may eliminate a source of off-system revenues that could be used to reduce their rates.

We expect that the impacts and incentives created by the imposition of reciprocity restrictions will vary significantly across the country. Accordingly, if Congress does address this issue, it should do so in a way that provides States with the flexibility to take these considerations into account while removing any Commerce Clause issue from consideration. We believe that Congress should not "legislate reciprocity," i.e. Congress should not adopt a hard and fast rule prohibiting a utility from selling power into an open retail market unless the utility has established a competitive retail market of its own.

**11. If Congress were to require "unbundling" of local distribution company services as part of a retail competition mandate, what practical problems might this present to state regulators?**

Thus far in the restructuring process, "unbundling" has involved the separation of the two main components of electric service: generation (power supply) and delivery (transmission and distribution). Only recently have States begun to consider unbundling within those categories by, for example, requiring that individual components of a service like local distribution be offered and priced discretely. It is possible that such distribution-related services as metering or billing could be priced and provided separately and competitively by someone other than the distribution company owning the wires used to deliver the power.

Unbundling of distribution in this way raises a number of critical issues that will be of concern to State regulators: first, consumer education. As we have seen with respect to newly competitive communications services, there is great potential for confusion and frustration on the part of consumers who are used to receiving a "bundled" bill from a single service provider. In order to make best advantage of the availability of competitive service providers, customers will need to understand what alternatives are available for what services, who the new providers are, how to understand competing advertising comparing services provided by new providers, and how to read their unbundled bill or bills. We anticipate that there will a major consumer education issue caused by separating generation and distribution; unbundling distribution services would clearly magnify the need to deal with this issue.

Second, consumer protection. We anticipate that in order to protect consumers, State commissions will need to monitor, and as necessary, regulate the providers of competitive distribution services, whether they be incumbent utilities or new entrants. Consumer protection can take the form of licensing requirements, complaint and restitution procedures, and other enforcement tools such as fines, injunctions and, if necessary, removal from the marketplace. Clearly, if States unbundle distribution and generation services coincidentally, the need for consumer safeguards will be much greater since more new entrants will be eligible to provide more discrete services to a consuming public unfamiliar with what it means to shop for electricity, or metering, or billing, or for that matter, what it means to deal with an aggregator, marketer or broker.

Third, jurisdictional questions. In Order No. 888, the FERC concluded that it has exclusive jurisdiction to regulate transmission services provided to a retail customer when a State implements retail competition.[6] Specifically, the Commission concluded that when a

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[6] In a recent decision, the Commission has begun to implement its jurisdictional claim in individual cases. *Potomac Edison Company*, 79 FERC ¶61,185 (May 16, 1997). Here, the Commission asserted jurisdiction over the transmission services necessary to

State allows a customer to purchase power supplies and power delivery separately, the transmission component of the delivery service is subject to its exclusive jurisdiction under section 201 of the Federal Power Act despite the fact that such transmission services were never FERC-jurisdictional as part of bundled retail service. It is NARUC's position that the Commission is legally incorrect, and that transmission services provided to a retail customer, whether bundled or unbundled, remain subject to State authority. Equally important, however, is the possibility that the Commission's decision will have a chilling effect on State restructuring programs due to the fact that a State's decision to allow retail competition could lead to the loss of the State commission's authority to regulate the delivery system needed to support third-party access to retail markets.

**12. Are unique problems posed for state public utility commissions in connection with public power or federal power producers in an era of increased competition in wholesale and retail electricity markets?**

NARUC has taken no position on the role that public power or federal power producers should play in a restructured market setting.

**13. How would federal legislation mandating competition by a near term date certain affect funding needs for state public utility commissions? If additional funding were needed, would it be available, and what problems might arise if it were not?**

As our answer to question 11 indicates, implementation of policies to promote competitive markets through unbundled service offerings will raise significant consumer education and consumer protection issues. Based on the experience of our members in implementing pro-competitive policies for local telephone service under the 1996 Telecommunications Act, we fully expect that States will receive significantly higher levels of inquiries and complaints from consumers and from new market entrants unfamiliar with the regulatory process. Dealing with these issues will consume time and resources.

Moreover, federal legislation mandating competition through State implementation of uniform standards is likely to require greater time and effort on the part of State commissions than if they were able to use State-established standards on their own schedules. Consideration and implementation of Federal standards not tailored to a given State's circumstances is likely to be less administratively efficient than if a State commission implements State statutes and regulations produced through a political and regulatory process which takes local conditions (be they climatic or demographic) into account.

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deliver electric energy in what FERC characterizes as a "buy-sell transaction," i.e. a transaction in which an retail customer arranges for the purchase of generation by the customer's serving utility from a third-party supplier for resale to the customer.

**14. What types of securitization plans have states adopted or considered as a means of providing for recovery of utility stranded assets? What risks and benefits are inherent in this approach, and who bears them?**

We are aware that California has implemented a securitization plan as part of its restructuring program, and Pennsylvania has enacted a statute authorizing securitization which its regulatory commission is in the process of implementing. Other States are also examining this option. Because this method of dealing with stranded cost recovery is so new, and not yet fully implemented anywhere, it is not clear how the costs and benefits of securitization will ultimately resolve themselves, nor what the potential tax consequences for the securitizing utility will be. Moreover, it appears possible at this early stage that the terms and conditions of the securitization process can be adapted to allocate costs and benefits in different ways through such means as securitizing some, but not all of expected stranded costs, or placing certain market risks on the utility in the event competition reduces prices more than the securitization plan anticipates. We believe that it is far too early for Congress to legislate policies favoring or disfavoring securitization. Until State programs have had a chance to take effect and be analyzed, their ultimate impact on consumers, shareholders and taxpayers will not be fully understood.

**15. There is a wide divergence of opinion as to whether or not PUHCA should be modified or repealed. Given the record level of merger activity, this question may become significant for all state regulators, whether or not they currently have regulatory responsibilities relating to registered holding company activities.**

**a. Do you believe PUHCA impedes competition, at the wholesale or retail level? Can "effective competition" be achieved regardless of whether Congress enacts changes to PUHCA?**

There can be little doubt that PUHCA affects competition. Congress has recognized as much when in PURPA and the Energy Policy Act (EPAct), it exempted QFs (in § 210(e) of PURPA) and EWGs (codified in § 32(a)(1) of PUHCA) from the Holding Company Act in order to allow greater competition in bulk power markets by increasing the universe of potential entrants and removing regulatory impediments to market entry. Because the EPAct's PUHCA exemption only applies to wholesale generators, PUHCA remains an impediment to generators that seek to enter retail markets.

Moreover, PUHCA is structured to address a vertically-integrated, monopoly-service-territory model of industry organization. Indeed, section 11(a) of PUHCA imposes on the SEC the obligation to regulate utility holding companies in a manner "appropriate to the operations of an integrated public-utility system." By contrast, as now understood, "industry restructuring" means the unbundling of utility services into discrete parts, through cost allocation procedures, structural separation, or divestiture of lines of business, i.e. to allow customers to choose to purchase services in a distinctly non-integrated manner, at least with respect to the services they purchase from their formerly vertically-integrated utility provider.

Accordingly, to the extent that unbundling is both necessary to greater competition and inconsistent with the integration requirements of section 11, PUHCA's continued existence will affect, and perhaps retard, the implementation of competitive markets.

However, to the extent that the repeal or substantial modification of PUHCA allows for incumbent holding companies to exploit the market power they retain as a result of holding substantial generation, transmission and distribution assets and systems, amendments to PUHCA could harm the development of competitive markets. Of particular concern is the possibility that such amendments could allow utility holding companies to diversify into new markets through reliance on the advantages provided by having a captive customer base in a protected home market. Further, repeal or modification of PUHCA could accelerate the current merger trend leading to greater industry consolidation. Utility mergers could recreate market power problems that unbundling of generation assets was intended to mitigate.

**b. Do you believe Congress should modify or repeal PUHCA? If so, why, and under what if any conditions?**

NARUC's policy on legislation to repeal or reform PUHCA is contained in the resolution attached hereto as Appendix C. We believe that legislation to amend or repeal PUHCA should not be adopted on a stand-alone basis, but rather, should be considered in the context of broader restructuring legislation. Moreover, such legislation must not explicitly or implicitly preempt State regulatory authority, must provide States and FERC with the ability to obtain access to the books and records of holding company affiliates whose activities may affect the company's operating utilities, and must preserve the diversification standards recently enacted by Congress in EPAct and last year's Telecommunications Act.

**c. Should Congress enact legislation to modify the holding in Ohio Power Co. v. FERC, 954 F.2d 779 (D.C.Cir. 1992)?**

Yes, and such legislation should not only preserve FERC's authority to address the passthrough of affiliate costs in wholesale rates, but also must protect State authority to regulate affiliate costs to be passed through retail rates. Moreover, if PUHCA legislation transfers the authority now exercised by the SEC to FERC, it must make clear that FERC's decisions do not bind or preempt State retail rate decisions.